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State v. Southwick Appellant's Reply Brief Dckt. 40855

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Respondent, vs. TAMI MARIE SOUTHWICK, Appellant.	)	S.Ct. No. 40855-2013 D.Ct. No. CR-2012-9572 (Twin Falls County)

REPLY BRIEF OF APPELLANT

Appeal from the District Court of the Fifth Judicial District of the State of Idaho In and For the County of Twin Falls

HONORABLE G. RICHARD BEVAN
District Judge

Deborah Whipple
NEVIN, BENJAMIN, McKAY & BARTLETT LLP
303 West Bannock
P.O. Box 2772
Boise, ID 83701
(208) 343-1000

Attorneys for Appellant

Idaho Attorney General
Criminal Division
P.O. Box 83720
Boise, ID 83720-0010
(208) 334-2400

Attorneys for Respondent

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II. ARGUMENT IN REPLY

A. The Evidence was Insufficient

As previously discussed, in an appeal challenging the sufficiency of the evidence, a guilty verdict will be overturned when there is not substantial evidence upon which a reasonable trier of fact could have found that the prosecution sustained the burden of proving the essential elements beyond a reasonable doubt. *State v. Warburton,* 145 Idaho 760, 761-2, 185 P.3d 272, 273-4 (Ct. App. 2008), citing *State v. Herrera-Brito,* 131 Idaho 383, 385, 957 P.2d 1099, 1101 (Ct. App. 1998). Sufficiency of the evidence questions turn on the specific facts of each case. *State v. Curry,* 153 Idaho 394, 410, 283 P.3d 141, 148 (Ct. App. 2012). While circumstantial evidence may sometimes be sufficient to support a conviction, evidence that is too attenuated is not sufficient. *Id.*

To establish possession in this case, the state was required to prove beyond a reasonable doubt both that Ms. Southwick knew of the drugs presence in the car and had the power and intention to control them. *State v. Blake,* 133 Idaho 273, 242, 985 P.2d 117, 122 (1999); *State v. Seitter,* 127 Idaho 356, 359, 900 P.2d 1367, 1370 (1995). Knowledge of the presence of the controlled substance and physical control must be independently proven beyond a reasonable doubt. *Seitter,* 127 Idaho at 360, 900 P.2d at 1371; *State v. Rogerson,* 132 Idaho 53, 58, 966 P.2d 53, 58 (Ct. App. 1998); *State v. Rozajewski,* 130 Idaho 644, 647, 945 P.2d 1390, 1393 (Ct. App. 1997).

Ms. Southwick set out in her Opening Brief how the state failed to prove knowledge of the residue on the scale and the power and intent to control the residue and likewise failed to prove knowledge of the drugs hidden in the passenger door and the power and intent to control

those drugs. In its response, the state apparently concedes that it did not present sufficient proof to establish Ms. Southwick's knowledge of and power and intent to control the drugs hidden in the passenger door because it simply does not mention those drugs except in mere passing references. Respondent's Brief at pages 5-7. Instead the state argues that it presented proof beyond a reasonable doubt of Ms. Southwick's knowledge of the residue on the scale and her power and intent to control that residue. *Id.*

To begin its argument, the state asserts, without any citation to authority, that the evidence that Ms. Southwick owned the car supports an inference that she intended to control everything found in the car. Respondent's Brief at page 5. However, the case law is contrary to the state's assertion: *State v. Burnside,* 115 Idaho 882, 885, 771 P.2d 546, 549 (Ct. App. 1989), is directly contrary to the state's argument. In *Burnside,* illegal mushrooms were found inside Burnside's car. The Court of Appeals vacated his conviction for possession of the mushrooms with intent to deliver stating:

> Here, in order for the state to prove Burnside possessed the mushrooms, the state had to show that Burnside was aware the mushrooms were in his car and that he exercised dominion and control over them. In short, the state had to show both knowledge and control. Moreover, the jury could not infer constructive possession from the mere fact that Burnside occupied, with a passenger, the automobile in which drugs were seized. It is fundamental to our system of criminal law that guilt is individual. Guilt by association is simply not sufficient. Therefore, in order to prevail the state had to offer evidence which established that Burnside, individually, knew of the illegal drugs and that he exercised dominion over them.

Id. (Citations and internal quotations omitted).

State v. Garza, 112 Idaho 776, 735 P.2d 1087 (Ct. App. 1987), is also instructive. In that case, the Court of Appeals held that the evidence was insufficient to support Ms. Garza's

conviction for possession of a controlled substance where the substance was found in a home which was also occupied by her husband. The Court noted that where a defendant is in non-exclusive possession of the premises wherein the drugs are found, there can be no legitimate inference that the defendant knew of the drugs and had control of them in the absence of other circumstances which tend to support the inference.

In short, the state cannot prove knowledge and intent to control simply by proving an illegal substance was inside a defendant's car. *See also State v. Blake,* 133 Idaho 237, 242, 985 P.2d 117, 122 (1999), holding that an inference of knowledge from control of the premises cannot be made, absent other circumstances, where the accused does not have exclusive possession of the premises.

The state next argues that Ms. Southwick's attempts to distance herself from ownership of the car provided evidence from which the jury could conclude that there was some sort of contraband in the car. Respondent's Brief at pages 5-6. This may be true - or it may not. But, that is not relevant - because there was contraband in the car that Ms. Southwick knew of - the scale which is drug paraphernalia. But, her knowledge of the scale is not the equivalent of knowledge that there was methamphetamine residue on the scale. *See State v. Blake, supra,* holding that a controlled substance conviction requires proof of knowledge of the nature of the substance involved; *State v. Tucker,* 131 Idaho 174, 178, 953 P.2d 614, 618 (1998), Schroder, J. concurring, noting that conviction requires knowledge of the presence of the controlled substance; *State v. Armstrong,* 142 Idaho 62, 64-5, 122 P.3d 321, 323-4 (Ct. App. 2005), holding that the defendant's ignorance of the presence of the substance is exculpatory; *State v. Stefani,* 142 Idaho 698, 132 P.3d 455 (Ct. App. 2005), holding that mistake of fact as to the possession of

the material requires an acquittal because the element of intent is not present.

The state presented no proof whatsoever that Ms. Southwick had seen inside the opaque black bag and thus knew that there was residue on the scale. Moreover, the state's argument that the scale was not recognizable as such unless the case had been opened was probative that Ms. Southwick had opened the case and seen the residue is not logically sound. Respondent's Brief at page 6. Ms. Southwick stated that she was holding the scale for another person. She never stated that she had opened the case. And, in fact, opening the case was unlikely. How many people asked to hold a friend's purse for a moment go through the purse? How many people asked to collect and hold vacationing neighbors' mail open and read the mail? How many people asked to store a friend's boxes during a house move go through the boxes? When people are asked to hold a closed container for another, the social norm is to not open the container and inspect the contents. The state presented no proof in the district court from which to infer that in this case social norms did not hold and Ms. Southwick inspected the scale after being asked to hold the scale in its closed case by another person.

Lastly, the state argues that the fact that Ms. Southwick put the scale between the seats instead of on the seat is indicative of an intent to hide it. But, again, given that the scale itself could be construed as paraphernalia, even if someone believed that Ms. Southwick intended to hide it, that belief does not provide sufficient proof of knowledge of the residue on the scale.

The evidence was not sufficient to convict Ms. Southwick. She therefore asks that her conviction be reversed and a judgment of acquittal entered.

B. Failure to Give a Unanimity Instruction was Fundamental Error

Ms. Southwick set out in her Opening Brief how even if reversal and entry of a judgment of acquittal was not required, reversal would be required in her case because the district court failed to give a unanimity instruction requiring the jury to agree on which methamphetamine was possessed - that on the scale or that in the door of the car. Opening Brief, pages 8-10. The state argues that this Court should not reverse the conviction because Ms. Southwick was not entitled to a unanimity instruction. The state does not argue that if Ms. Southwick was entitled to an instruction that the error would be harmless. Respondent's Brief pages 8-11.

Both the state and Ms. Southwick agree that jury verdicts must be unanimous. Ms. Southwick cites Idaho Const. Art. I, § 7 and *State v. Johnson,* 145 Idaho 970, 977-78, 188 P.3d 912, 919-920 (2008). Opening Brief p. 8. The state cites *State v. Shackelford,* 150 Idaho 355, 375, 247 P.3d 582, 602 (2010); ICR 31(a). Respondent's Brief at page 9. Where the state disagrees with Ms. Southwick is in its conclusion that having methamphetamine residue on the scale and in the baggie hidden in the car door is simply one act of possession. The state, without citation to authority, simply claims that these actions if proven are not two separate acts of possession of methamphetamine. However, there is ample case law against the state's position. *See, United States v. Privett,* 443 F.2d 528, 529 (9th Cir. 1971), defendant properly charged with three separate counts of heroin offenses where heroin found in defendant's pocket, underneath the front seat of the car he was driving at the time of arrest, and in a suitcase in the trunk of the car; *United States v. Griffin,* 765 F.2d 677, 683 (7th Cir. 1985), cocaine found on defendant's person and on the floorboard of the car constituted two separate acts of possession; *United States v. Rich,* 795 F.2d 680 (8th Cir. 1986), possession of drugs in home, on person and in luggage

supports separate convictions.

The state's reliance on *State v. Severson,* 147 Idaho 694, 711, 215 P.3d 414, 431 (2009), is unavailing. Respondent's Brief page 9-10. *Severson* specifically holds that when the defendant commits several acts, each of which would independently support a conviction for the crime charged, a unanimity instruction must be given. While in *Severson,* no unanimity instruction was required because there could be but a single charge of murder of a single dead person by a single defendant, *Severson* is inapplicable to Ms. Southwick's case as if the state had convincing proof that she possessed both the residue on the scale and the baggie in the door, she could have been charged with two counts of possession. *Privett, supra*; *Griffin, supra*; *Rich, supra.* If there had been two dead bodies in *Severson,* the defendant had been charged in a single count with murder, and the state presented evidence of murder by the defendant as to both bodies, then a unanimity instruction would have been required. Likewise, in this case, where Ms. Southwick was charged with a single count of possession and the state presented evidence going toward, (but as discussed above not actually proving), two separate acts of possession, a unanimity instruction was required.

Because a unanimity instruction was required, but not given, Ms. Southwick's conviction must be reversed.

III. CONCLUSION

Ms. Southwick asks this Court to reverse her conviction and enter a judgment of acquittal because the evidence was constitutionally insufficient. In the alternative, she asks that her conviction be reversed based upon the error in failing to give a unanimity instruction.

Respectfully submitted this 5th day of August, 2014.

Deborah Whipple
Attorney for Tami Southwick

CERTIFICATE OF SERVICE

I CERTIFY that on August 5, 2014, I caused two true and correct copies of the foregoing document to be:

__X__ mailed

___ hand delivered

___ faxed

to:

Russell Spencer
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010

Deborah Whipple